THONG AH TEH & ORS

v.

EASTERN GARMENT MANUFACTURING CO SDN BHD

HIGH COURT MALAYA, PENANG
RK NATHAN J
[CIVIL APPEAL NO: 16-4-2001]
12 DECEMBER 2001

LABOUR LAW: *Employment - Retirement - Retirement benefits - Computation of - Whether to commence from date of employment or date imposed under retirement policy*

EVIDENCE: *Adverse inference - Non-production of material documents - Whether presumption to apply - Evidence Act 1950, s. 114(g)*

The claimant commenced employment with the defendant on 1 August 1966. Subsequently, in 1988, the defendant issued a revised policy of retirement which stated, *inter alia*, that for the purpose of computing retirement benefits, the date of commencement of employment would be taken as 1 January 1980. Based on this, the claimant and six others were paid their retirement benefits upon reaching their retirement age. Dissatisfied with amount, they lodged a complaint with the Labour Department but their claims were dismissed. This was an appeal against the said decision on the premise that the defendant could not arbitrarily impose a condition that the computation of the retirement benefits should start from 1 January 1980.

The defendant argued that retirement benefits was not a compulsory benefit under the law. Furthermore, as the claimant's appointment letter was silent on the issue of the said benefits, the claimant was not entitled to it before 1 January 1980.

Held:

[1] The issue before this court was not whether the claimants were entitled to their retirement benefits before 1980 but whether the computation of the said benefit should commence from 1966 as it was not in dispute that the claimants had been paid retirement benefits from 1980. (p 139 f)

[2] The word "revised" appearing in the said policy of retirement allowed an inference that an earlier version existed. The defendant did not submit any evidence to prove that an earlier version did not exist. Should the defendant deny its existence, then it ought to explain as to why there was a need to revise the policy in 1988 when none existed before the date. (p 140 b)

[3] Section 114(g) of the Evidence Act 1950 was invoked against the defendant for its failure to produce the earlier version. It was reasonably inferred that there was an agreement to pay the claimant the said benefits as of 1 August 1966. (p 140 b-d)

[Appeal allowed with costs. Decision of Labour Department set aside.]

Case(s) referred to:
Lee Fatt Seng v. Harper Gilfillan (1980) Sdn Bhd [1988] 1 CLJ 270; [1988] 1 CLJ (Rep) 156 ***(refd)***
Petaling Rubber Estate Ltd & Anor v. Nadarajah & Ors [1988] 1 MLJ 22 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(g)
Employment Act 1955, ss. 2, 69(1)(a)

Other source(s) referred to:
Chambers 20th Century Dictionary

For the appellant - Siva Subramaniam; M/s Adam Bachek & Assocs
For the respondent - Leow Tat Fah; M/s BC Teh & Yeoh

Reported by M Maheswaran

JUDGMENT

RK Nathan J:

Facts

Thong Ah Teh @ Thong Nam Seng commenced employment with the defendant on 1 August 1966. There was then no letter of appointment given to the claimant and therefore there was no evidence as to whether the claimant and the six others were on any period of probation. However each of the claimants was given a letter of appointment dated 17 January 1985. It is necessary to reproduce the said letter of appointment of this claimant.

FORM A

THE EASTERN GARMENT MFC CO SDN BHD
BAYAN LEPAS FREE TRADE ZONE
PHASE III
PENANG

Date: January 17, 1985

To: Mr. Thong Nam Seng

From: Administrative Manager

Re: APPOINTMENT OF ASST PROD EXECUTIVE TERMS & CONDITIONS OF EMPLOYMENT

Date of Commencement of Employment: 1-8-1966

1. **SALARY**
Your salary with effect from 1st January, 1985 is $1,430.00 per month and an allowance of $30.00 per month.

2. **WORKING HOURS**
Monday to Saturdays: Normal working hours are from 8.15a.m. to 12.00 noon/1.00p.m. and 12.45p.m./1.45 p.m. to 5.00p.m. and the rest day is on Sunday.

3. **OVERTIME/WORK ON REST DAYS/PUBLIC HOLIDAYS**
The rates for work on the above are in accordance with the Employment Act, 1955.

4. **TRANSPORT**
The Company provides free transport to and from places of work only at certain appointed routes. You may clarify your pick-up point with the Personnel Office.

5. **MEDICAL BENEFITS**
The Company provides free medical consultations, defrays the cost of sundry medicines prescribed by its appoined doctors and shall pay for the cost of hospitalisation according to the category of staff as stipulated in the Medical Benefit Schedule, a copy of which can be inspected in the Personnel Office.

6. **LUNCH**
The Company provides free lunch at the factory staff canteen to employees who are on duty.

7. **PAID PUBLIC HOLIDAYS**
13 days paid public holidays fixed by the Company as published on our Notice Board.

8. PAID ANNUAL LEAVE

(i) 9 days on completion of 1 year's service
(ii) 13 days on completion of 2 years' service
(iii) 17 days on completion of 5 years' service
(iv) 18 days on completion of 10 years' service.

9. RETIREMENT AGE
The normal retirement age for all male and female employees shall be 55 years and 50 years respectively. By mutual agreement, retired employees may be re-employed subject to medical examination.

10. NOTICE OF TERMINATION

Termination of employment can be effected by either party giving to the other one month's notice in writing or by paying one month's salary *in lieu* of notice.

11. OTHERS

(i) The Company reserves the right to transfer employees to any section, area or department for work if it deems necessary and suitable.

(ii) On promotion, an employee will be required to serve a 3-month probationary period in the promoted grade and if his/her performance is found not satisfactory, he/she will be reverted to his/her former position with the same pay prior to the promotion

(iii) Annual review will only be considered for confirmed employees who have served the Company for at least six (6) months continuous service, inclusive of probationary period.

(iv) For security reasons, all employees entering or leaving the factory premises will be subject to bodily search at any time. Refusal to be searched constitutes misconduct on the part of the employee and may subject to disciplinary action to be taken.

(v) During the currency of employment, no employee shall disclose to any person or persons, body corporate, any Company Policy or trade secret entrusted to the employee or coming to the employee's knowledge without specific permission in writing of the Company Managing Director.

THE EASTERN GARMENT MFC. CO. SDN. BHD.
Sgd ...
Saw Leon Wah Administrative Manager

N.B.: As salary is a personal matter, kindly keep it confidential.

THONG NAM SENG NRIC NO: 2528509, hereby accept the terms and conditions as stipulated above.

Signed: Date:

SLW/tkk

It is apparent from the said letter of appointment that the defendant had acknowledged the fact that the claimant was employed as of 1 August 1966. When the claimant reached the normal retirement age he was given a letter dated 30 December 1997 by the defendant. The said letter is also reproduced herewith and it reads as follows:

THE EASTERN GARMENT MFG. CO., SDN. BHD. (005177-A)

To : Saw Geok In/Human Resource Department
Date : Dec 30, 1997
Ref : HR-IN/087/SG1/CT/283/97
Re : Retirement

With effect from December 17, 1997, you have attained the normal retirement age. The retirement benefit payable to you is RM37,765.16.

Yours faithfully,

THE EASTERN GARMENT MPG CO SDN BHD

...
SAW GEOK INN
HUMAN RESOURCE MANAGER

I, THONG AH TEH @ THONG NAM SENG (NRIC: 2528509) understood that I have retired from the company and hereby accept the above retirement benefits as full and final payment in respect of my retirement.

Signature: signed Date: 31/12/97

LOT 1242. SUNGAI KLUANG ESTATE. BAYAN LEPAS FREE INDUSTRIAL ZONE. PHASE 3. 11900 PENANG. MALAYSIA
TEL: 04-6432201-7. FAX: 04-6432660

The defendant issued out what it called a policy of retirement which was said to have been revised as at 3 June 1988. Whilst containing details of the retirement benefits, cl. 3 specifically stated that the policy of retirement would take effect as of 1 January 1980. Clause 6 which stipulated the mechanics of calculating the retirement benefits was said to become effective as of 1 April 1997. However under paragraph headed Effective Date, sub-cl. (3) states that for the purpose of computing retirement benefits the service of an employee who commenced employment prior to 1 April 1980 shall be deemed to commence from 1 January 1980.

Dissatisfied with the payment made by the defendant the claimant and six others made complaints to the Labour Department which heard the case and on 12 January 2001 dismissed the claims for retirement benefits. This is the claimant's appeal against that decision.

Findings Of The Court

Clearly the Labour Department has the power to hear this complaint under s. 69(1)(a) of the Employment Act 1955 ('the Act') which reads as follows:

69. (1) The Director General may inquire into and decide any dispute between an employee and his employer in respect of wages or any other payments in cash due to such employee under:

(a) any term of the contract of service between such employee and his employer;

Section 2 of the Act defines "wages" to mean:

> basic wages and all other payments in cash payable to an employee for work done in respect of his contract of service but does not include:
>
> (a) the value of any house accommodation or the supply of any food, fuel, light or water or medical attendance, or of any approved amenity or approved service;
>
> (b) any contribution paid by the employer on his own account to any pension fund, provident fund, superannuation scheme, retrenchment, termination, lay-off or retirement scheme, thrift scheme, or any other fund or scheme established for the benefit or welfare of the employee;
>
> (c) any travelling allowance or the value of any traveling concession;
>
> (d) any sum payable to the employee to defray special expenses entailed on him by the nature of his employment;
>
> (e) any gratuity payable on discharge or retirement; or
>
> (f) any annual bonus or any part of any annual bonus;

It is the claimant's contention before me that the word "wages" must be given a broader interpretation. Whilst acknowledging that the claimants were paid their retirement benefits from 1 January 1980 to the date of retirement the claimant herein argued that he must be paid his retirement benefits from date of commencement ie, from 1 August 1966 and that it was wrong for the defendant to arbitrarily impose a condition that notwithstanding the fact that the claimant had commenced employment before 1 January 1980, to attract retirement benefits, he would be deemed to have been employed as of 1 January 1980.

It was suggested to the claimant in cross-examination that since the letter of appointment of the claimant made no reference to retirement benefits prior to 1 January 1980 he was not entitled to the same. The claimant contended that when he was given the letter of appointment on 17 January 1985, he was not given a copy of the policy of retirement and that he was never challenged on this under cross-examination. To a question from the court Leow for the defendant admitted that this was so "because this policy of retirement was only given on 3 June 1988." I shall come back to this later.

The Law

It is the case of the defendant that retirement benefits is not a compulsory benefit under the law. Leow also submitted that there is no documentary proof that the claimants are entitled to retirement benefits before 1980 and that this fact was admitted to by all the complainants in the Labour Court. In *Petaling Rubber Estate Ltd & Anor v. Nadarajah & Ors* [1988] 1 MLJ 22 SC the then Supreme Court held at p. 23 "that what is payable as wages under the Act is not "all remuneration" but all remuneration for work done in respect of his contract of service excluding the specified types of remuneration". The court further held at p. 24 that the words "per normal day worked" are not the same as "for work done". Remuneration payable for work done is not the same as remuneration payable upon completion of a full day's work. In *Lee Fatt Seng v. Harper Gilfillan (1980) Sdn Bhd* [1988] 1 CLJ 270; [1988] 1 CLJ (Rep) 156 Wan Hamzah SCJ very succinctly expressed his views on this very same issue at p. 273 (p. 159) as follows:

> It seems that the words "work done" in the definition of "wages" are used so as to stress on the requirement that the remuneration must be for work done in respect of the contract of service of the employee concerned, so that any payment made to him by the employer *ex gratia*, not for work done or to be done, and not in connection with the contract of service, is not part of the wages.

Since I am bound by the decision of the then Supreme Court in interpreting the meaning of wages and in which case retirement benefits as described in the case before me clearly will not fall under the definition of wages. But to my mind I do not have to look to such an interpretation to see if the claimants herein are entitled to any retirement benefits before 1980. Since it is not in dispute that the claimants had been paid retirement benefits as from 1980, the only issue is whether the claimant is entitled to such retirement benefits from 1966 when he commenced employment.

I had said earlier that I shall return to the policy of retirement which the defendant had said in evidence was only given to the claimant on 3 June 1988. What is significant is that the very same policy of retirement which is about 74 pages and which has been produced as an exhibit, has at its commencement the words 'Revised 3 June 1988". The meaning of the word "Revised" as stated in the *Chambers 20th Century Dictionary* is as follows: "to examine and correct; to make a new improved version of, to look at again". Whilst the claimants have contended that this Policy of Retirement containing the terms and conditions of employment had not at all been given to them, the defendants contend that a copy of the issue dated 3.6.88 had been given to each of the claimants. What then has happened to the earlier Policy of Retirement that had been revised? Why was that earlier copy not produced? Could it be that in that earlier copy the defendant had in fact

agreed to pay the claimant from 1.8.66 and realising that such a copy had not in fact been given to the claimant, the defendant, to evade payment of a larger sum, revised the earlier edition to bring the calculation for the payment of the retirement benefits to commence from 17 January 1985 when the letter of appointment was given and thereafter only handed this copy on 3 June 1988. I am of the view that this is a fit and proper case for the court to invoke s. 114(g) of the Evidence Act 1950. In any case, the defendant did not testify that there was no earlier edition of the policy of retirement. If the defendant had denied it then he would have had to explain why it had to be revised on 3 June 1988 when none was in existence before that date.

When the court thus draws an inference adverse to the defendant the only reasonable inference that the court can draw is that there was an agreement to pay as of 1 August 1966. This is an appeal before me and as appeals are to be treated as a re-hearing, even at this stage the defendant offered no explanation.

In the circumstances therefore I allow the appeal with costs and set aside the decision of the labour court made on 12 January 2001. The claimant is entitled to the retirement benefits to commence as of the date of employment that is 1 August 1966.